IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

Second Appeal No.1294 of 2005
with
Civil Application No.1437 of 2004

Shankar Balkrishna Toraskar ..Appellant

vs.

Pandurang Sitaram Khot ..Respondent

Shri A.I.I. Patel for appellant.
Shri A.S.Khandeparkar for respondent.

CORAM: S.C.DHARMADHIKARI J.
11th July, 2007

P.C.

1. Heard Shri Patel for the appellant and Shri Khandeparkar for the respondent.

2. The appellant/original defendant in Civil Suit No.10 of 1986 filed by the respondent/original plaintiff for specific performance of an agreement of resale contends that the Court below was in error in proceeding exparte and decreeing the suit filed by the respondent. Shri Patel invited my attention to the fact that in the Trial Court the defendant despite filing the written statement did not lead any evidence and that is how the suit has been decreed. He submits that this approach of the Court below is vitiated and would give rise to the substantial question of law in as much as the decree is for specific

performance which the plaintiff could not have obtained unless all the ingredients necessary for decreeing such a suit in law are pleaded and proved by him so also it is established that the law of limitation permits grant of decree of this nature. The learned Judge should satisfy himself that there is no prohibition in law for grant of such a decree. whether the defendant is absent despite filing the written statement or fails to cross examine the plaintiff, that is immaterial as the Court has to be satisfied about the requirement in law.

3. At the instance of the present appellant/original defendant I do not wish to entertain such a challenge and contention in as much as the Court below on the basis of the admitted facts has decreed the suit. The sale deed of 21st January, 1981 had a condition in as much as it contains a covenant/recital with regard to resale of the land covered thereunder in favour of the original plaintiffs. The only argument before the Court below was that the covenant of resale or repurchase is not there in the sale deed and the appellant having not signed the same is not binding upon him.

4. This contention has been negatived by relying upon the material produced by the plaintiff and his testimony. The certified copy of the sale deed is produced at Exh.24. The plea of fraud being practiced upon the appellant has

been negatived by relying upon the proceedings instituted by the appellant himself. Civil Suit No.42 of 1981 which was filed by the present appellant against the respondent/plaintiff was dismissed and certified copy of that judgment and decree was taken on record in the instant suit. That judgment was challenged but the judgment was affirmed in appeal as well. It appears that the judgment of the lower Appellate Court was challenged in second appeal and that was also rejected. No proceedings have been initiated to challenge these judgments and orders. In such circumstances, the inference drawn that, leave alone any fraud, this is an attempt to wriggle out of the obligation to resell the subject property, cannot be faulted. This is not a court where reappreciation and reappraisal of this material is permissible. In such circumstances when no substantial question of law is raised the second appeal is devoid of any merit and is liable to be dismissed and is accordingly dismissed.

5. In view of dismissal of second appeal, civil application does not survive and stands disposed off accordingly.

(S.C.DHARMADHIKARI J.)